No. 15116

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLEES

CASEY & PRUZAN
JACK M. SAWYER,

30th Floor Smith Tower
Seattle 4, Washington

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COUNTER STATEMENT

This is an appeal by defendant United States of America from a judgment holding it liable under the Federal Tort Claims Act for personal injuries and property damage sustained by appellees in a collision on the public highway of the State of Washington between a vehicle operated by one of appellees and a truck-trailer owned by the United States and loaned to the Washington National Guard.

The United States truck-trailer was operated by William Brown while performing one of his primary duties as a full time civilian unit materiel caretaker of United States property assigned to Battery C of the 770th AAA Battalion of the Washington National Guard (R. 128, 132). Shortly before the accident Brown

had taken delivery of the truck and trailer at Camp Murray, the Washington National Guard headquarters, and was delivering it to said Battery C in Seattle at the time of the accident (R. 43, 44).

Brown was also a sergeant in Battery C, 770th AAA Battalion. It was found by the court, and no testimony was offered to the contrary, that Brown was at all times herein involved acting in his capacity as a full time civilian materiel caretaker (R. 66).

The admitted facts are that the two and one-half ton truck and four ton trailer were each equipped with electrical brake connections but that the voltage and size of the connections were different and could not be joined without use of a conversion kit which had not been made available to the Washington National Guard by the Department of the Army (R. 45). The court found that these facts were known to Brown and to Lt. Col. Hagen, United States Property and Disbursing Officer at Camp Murray, when Col. Hagen authorized issuance of the truck and trailer to Brown at Camp Murray (R. 67).

The accident occurred when Brown, in attempting to avoid Pacific Telephone and Telegraph Company equipment on the highway, applied the truck brakes, and the truck and unbraked trailer jack-knifed into opposing traffic in the path of appellee's vehicle (R. 91).

Suit was filed under the Federal Tort Claims Act

against the United States. A separate suit was filed by appellees against Pacific Telephone & Telegraph Company for negligence in failing to post adequate warnings of their equipment in the highway. The two cases were consolidated for trial.

Appellees' claim of negligence against the United States, insofar as this appeal are concerned, were: that Brown was the agent, servant and employee of the United States, acting within the scope and course of his employment and that Brown was negligent in operating the truck and trailer without brake connections between them; that the United States was negligent in furnishing to and permitting the operation on the public highways of the State of Washington, of the truck and trailer without brake connections between them. (R. 48).

The United States, in answering, denied that Brown was negligent and denied that he was a federal employee (R. 10). For affirmative defense the answer asserted that Brown was an employee of the State of Washington Military Department and that there could therefore be no recovery against the United States under the Federal Tort Claims Act (R. 12-13).

After trial the court held: that Brown was at all times the agent, servant and employee of the United States acting within the scope of his office and employment as unit materiel caretaker; that Brown was negligent in operating the truck and trailer on the public highways of the State of Washington without

brake connections to the trailer that could be applied from the cab of the truck; that Col. Hagen was at all times the agent, servant and employee of the United States, acting within the scope of his office and employment as United States Property and Fiscal Officer in authorizing issuance to Brown of the truck and trailer, knowing that they would be operated on the public highways of the State of Washington and knowing that said operation was illegal (R. 66, 67). The court found Pacific Telephone & Telegraph Company not negligent and entered judgment against the United States in the sum of $56,404.75 for Mrs. Wendt and $1,392.33 for Mr. Rosellini (R. 71).

QUESTION PRESENTED

Whether (1) a full time civilian unit materiel caretaker of United States property loaned to the Washington National Guard is an employee of the United States while acting within the scope of such employment, when such individual is also an enlisted man in the Washington National Guard; and (2) whether a United States Property and Disbursing Officer is, under the facts of this case, an employee of the United States.

STATUTES INVOLVED

The pertinent sections of statutes cited by appellees are as follows:

Title 5, U.S.C.

§ 751. Disability or death of employee—Wilful misconduct—

The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

Title 28, U.S.C.

§ 1346. United States as defendant

* * * * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court of the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2101 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Title 32 U.S.C.

§ 4a. National Guard of United States—Establishment—Composition—Officers

The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided. * * *.

§ 5. Organization of National Guard units.

Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: Provided, That no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.

§ 13. Annual reports by adjutants general of States.

The adjutants general of the States, Territories, and the District of Columbia and the officers of the National Guard, shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe.

§ 15. Inspections of National Guard.

The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers, of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act (this title). The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property provided for by this title, and for determining what organizations and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act (this title).

§ 17. Rules and regulations.

The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this Act (this title).

§ 18. Appointment of officers in National Guard of United States.

Appointments in the National Guard of the United States in

grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate.

§ 18a. Form of commission—Officers in National Guard.

All persons appointed in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States.

§ 21. Annual appropriation.

A sum of money shall be appropriated annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores, and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are or may be authorized by law.

§ 31. Type of arms, equipment, and uniforms of National Guard.

The National Guard shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army.

§ 33. Issue of arms to National Guard.

The Secretary of War is hereby authorized to procure, under such regulations as the President may prescribe, by purchase or manufacture, within the limits of available appropriations made by Congress, and to issue from time to time to the National Guard, upon requisition of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, such number of United States service arms, with all accessories, Field Artillery, materiel, Engineer, Coast Artillery, Signal and Sanitary materiel, accouterments, field uniforms, clothing, equipage, publications, and military stores of all kinds, including public animals, as are necessary to arm, uniform, and equip for field service the National Guard in the several States, Territories, and the District of Columbia: * * *.

§ 42. Care of government animals—Caretakers of animals, armament and equipment—Compensation

Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services and supplies for the Government animals issued to any organization, and for animals owned or hired by any State, Territory, District of Columbia, or National Guard organization, not exceeding the number of animals authorized by Federal law for such organization and used solely for military purposes, and for the compensation of competent help for the care of materiel, animals, armament, and

equipment of organizations of all kinds, under such regulations as the Secretary of War may prescribe.

The compensation paid to caretakers who belong to the National Guard, as herein authorized, shall be in addition to any compensation authorized for members of the National Guard under any of the provisions of the National Defense Act (this title).

Under such regulations as the Secretary of War shall prescribe, the material, animals, armament, and equipment, or any part thereof, of the National Guard of any State, Territory, or the District of Columbia or organizations thereof, may be put into a common pool for care, maintenance, and storage; and the employment of caretakers therefor, not to exceed fifteen for any one pool, is hereby authorized.

Commissioned officers of the National Guard shall not be employed as caretakers except that, under such regulations as the Secretary of War shall prescribe, one such officer not above the grade of captain for each heavier-than-air squadron, and one such officer not above the grade of captain for each pool, may be employed. Either enlisted men or civilians may be employed as caretakers, but if there are as many as two caretakers in any unit, one of them shall be an enlisted man.

Funds hereafter appropriated under the provisions of the National Defense Act (this title), as amended, for the support of the National Guard of the several States, Territories, and the District of Columbia, shall be supplemental to moneys appropriated by the several States, Territories, and the District of Columbia, for the support of the National Guard, and shall be available for the hire of caretakers and clerks: *Provided*, That the Secretary of War shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed.

§ 49. Property and disbursing officers.

The governor of each State and Territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, the Adjutant General or an officer of the National Guard of the State, Territory, or District of Columbia, who shall be regarded as property and disbursing officer of the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so

much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safekeeping and proper disposition of the Federal property and funds intrusted to his care. He shall, after having qualified as property and disbursing officer, receive pay for his services at a rate to be fixed by the Secretary of War, and such compensation shall be a charge against the whole sum annually appropriated for the support of the National Guard: Provided, That when traveling in the performance of his official duties under orders issued by the proper authorities he shall be reimbursed for his actual necessary traveling expenses, the sum to be made a charge against the allotment of the State, Territory, or District of Columbia: Provided further, That the Secretary of War shall cause an inspection of the accounts and records of the property and disbursing officer to be made by an inspector general of the Army at least once each year: and provided further, That the Secretary of War is empowered to make all rules and regulations necessary to carry into effect the provisions of this section.

§ 61. System of discipline.

The discipline (which includes training) of the National Guard shall conform to the system which is or may be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of this Act (this title).

§ 66. Assignment of officers and men of Regular Army for instruction of National Guard.

For duty in the National Guard Bureau and for instruction of the National Guard the President shall assign such number of officers of the Regular Army as he may deem necessary; also, such number of enlisted men of the Regular Army for duty in the instruction of the National Guard.

NGR 75-16 § 2.

"National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of materiel, armaments, vehicles, and equipment provided for the National Guard

and used solely for military purposes. The Secretary of the Army has delegated to the Adjutants General of the several states, territores, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may be from time to time be issued by the Chief, National Guard Bureau."

SUMMARY OF ARGUMENT

(1) A member of a federally recognized State National Guard unit which has not been called into active federal service is not an employee of the United States merely by virtue of his membership in the state National Guard.

(2) A full time civilian materiel caretaker of United States property loaned to a state National Guard, who is also a member of a state National Guard unit, is either an employee solely of the United States or, under the theory of "dual mastership," is an employee of both the state and the United States, even with respect to the same act, when in the performance of his duties as a civilian unit materiel caretaker.

(a) The United States has sufficient right to control the civilian unit materiel caretaker to establish the master-servant relationship between them.

(b) If the state does exercise any control over the unit materiel caretaker, such control is delegated to the state from the Secretary of the Army and the federal government, and is not exercised independently by the state.

(3) The United States Property and Disbursing Officer is a federal employee, the ultimate authority for his appointment resting with the Secretary of the Army. While the United States Property and Disbursing Officer is not entirely on an equal basis with an officer of the Regular Army on active duty, he is nevertheless an employee of the United States whose duties principally consist of accounting for military materiel loaned to state National Guard units. The theory of dual mastership may here again reconcile what to the appellant appears to be an irreconcilable conflict.

(4) Holding that the civilian unit material caretaker and United States Property and Disbursing officer are employees of the United States within the meaning of the Federal Tort Claims Act in this case does not open the door to federal liability for its many grant-in-aid programs.

I.

The United States possesses the requisite right to control unit materiel caretakers, and, as a consequence, is responsible for their negligent acts.

The position of "unit materiel caretaker" does not exist independently of federal legislation. It is purely the creature of federal statute, 32 USC 42. In addition to creating the position, the aforesaid statute provides that the caretakers who are hired shall be compensated under such regulations as the Secretary of the Army shall prescribe, such compensation to be

paid out of federal funds, and in addition to any compensation paid for regular drill and training. This significant proviso is also found in the statute:

> "The Secretary of the Army shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed."

Pursuant to the aforesaid statute, the National Guard Regulations 75-16 was promulgated on January 7, 1953. Section 2 of this regulation provides:

> "National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administration and accounting duties, maintenance, repair and inspection of materiel, armaments, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the Adjutants General of the several states, territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purvue of these regulations; subject to the provisions of law and such instructions as may be from time to time be issued by the Chief, National Guard Bureau."

The regulations further define various classes of workers, establish the number to be employed, set qualifications for the various classes, provide for appointment

of workers and a place for their employment, set pay scales and other working conditions. These civilians, when employed, are required to execute standard federal "loyalty oath." They are paid from federal funds budgeted for aid to the National Guard by warrants drawn upon the Treasury of the United States. This property is assigned to the National Guard but remains the property of the United States, 32 USC 33.

Statutory control over the federally recognized National Guard units is exercised in several ways, but the following statutes are illustrative of both the method and extent of that control:

> 32 USC Section 13: The Adjutants General of the States, Territories and the District of Columbia and the officers of the National Guard, shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe.
>
> 32 USC Section 15: The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men

> thereof are sufficiently armed, uniformed, equipped and being trained and instructed for active duty in the field of coast defense. . . ."

Paragraphs (12) and (13) of Section 13, SR 20-10-8 sets up the requirements that the Inspector General upon making his Armory inspection shall ascertain that the unit materiel caretaker has proved himself qualified for the job, that he work the required number of hours, that his federal pay is within the prescribed limits, and that other duties assigned to him (presumably as a member of the National Guard) do not interfere with his "primary duties" (those of unit materiel caretaker).

In view of the foregoing, it would seem to be legalistic in the extreme to take the position that a position created by federal statute, circumscribed and defined by federal regulations, and paid for out of federal funds, does not, in some way, involve the United States as more than an interested onlooker. It seems appropriate to appellees to suggest what they deem to be a "common sense" approach to the question, which substantially is that the United States created the position and paid its holder because it derives some benefit from his duties. The very notion of a "caretaker" suggests a benefit to the owner of the property in his care—in this case the United States. It would seem manifest in view of the statutes cited hereinabove, that any control over the unit materiel caretaker which is exercised by the Adjutant General of the State or Territory is done purely in a representative capacity

as an agent for the Secretary of the Army, who has plenary power to prescribe regulations for the position.

The State of Washington National Guard hires approximately 65 civilian employees who are entirely separate from the unit materiel caretakers. These 65 employees are considered strictly State employees and General Stevens' testimony made a clear distinction between them and the civilian unit materiel caretakers, further emphasizing the master-servant relationship between the United States and the materiel caretakers (R. 142, 143).

Appellant takes the position that if any control over the unit materiel caretaker is exercised by the state Adjutant General, then that, in itself, must necessarily preclude any control at all being exercised over him by the United States. Appellees contend that a dual mastership relation is well known in the law, and that even if it be conceded that the State of Washington exercises some measure of control over the unit materiel caretaker in question, nevertheless such control, if any, was not incompatible with the control already exercised over the caretaker by the United States as above mentioned.

The duality of the mastership which may exist at various times between the unit materiel caretaker and the state and federal government, respectively, is emphasized by the very statute which creates the position, 32 USC 42:

> ". . . Either enlisted men or civilians may be employed as caretakers, but if there are as many as two caretakers in any unit, one of them shall be an enlisted man."

Clearly, Congress in creating the position of unit materiel caretaker contemplated that it would be filled, in some instances, at least, by civilian personnel who had no connection whatever with the State of Washington, but were simply hired by the federal government for the purpose of protecting its equipment which had been loaned to the particular state.

As was pointed out in *United States v. Elmo,* 197 F. 2d 230 (C.A. 5), the United States clearly recognizes the duality of the mastership between the unit materiel caretaker and the federal and state governments where death or disability occurs to a caretaker in the performance of duty. If disability occurs during National Guard training, the caretaker, if he happens to be a member of the National Guard, is entitled to the disability benefits available to members of the Armed Forces. On the other hand, if the unit materiel caretaker is injured during the course of his civilian employment, he is entitled to receive all the death and disability benefits of other civilian employees of the United States, under the United States Employees Compensation Act of September 7, 1916, as amended, 5 USC 751, et seq. The record clearly sets this out (R. 117, 137, 163).

> Restatement of Agency, Section 226. "A person may be the servant of two masters not joint

> employers at one time as to one act, provided that the service to one does not involve abandonment of service to the other."

The precise factual situation was presented in *Courtney v. United States,* 230 F. 2d 112 (C.A. 2), wherein the court stated:

> "But we need not decide whether or not Truex is an 'employee' of the State of New York. Whether he was an 'employee of the Government' is wholly a federal question based upon federal statutory interpretation. 28 USC § 1346 (b), 2671. Consequently his status under New York law is irrelevant. Moreover, we know of no rule of law that service to federal and state government is incompatible, or that one cannot be an employee for some and not for all purposes."

The *Courtney* case explicitly states the principle of "dual-mastership" which is implicit in the other cases which have determined the liability of the United States for the acts of a National Guard unit materiel caretaker committed within the scope of his employment. As is conceded by appellant, all of these cases have held the United States liable, since, appellees contend, any other ruling would stultify the Act of Congress which created the position. The cases upon which appellees rely, and which support their position, are:

> *United States v. Holly,* 192 F. 2d 221 (C.A. 10);
> *United States v. Elmo,* 197 F. 2d 230 (C.A. 5);

United States v. Duncan, 197 F. 2d 233 (C.A. 5);
O'Toole v. United States, 206 F. 2d 912 (C.A. 3);
Courtney v. United States, 230 F. 2d 112 (C.A. 2)
Watt v. United States, 123 F. Supp. 906 (D.C. Ark);

Appellant's objection to the reasoning of the *Holly* case is that it "seems instead to be grounded upon the fact that caretakers are paid from federal funds." (P. 33 Appellant's Brief). Appellees submit that upon closer analysis the reasoning of the *Holly* case is not solely to the effect that it would be unlikely that the United States would pay for services which did not benefit it, but rather, is based upon the broader ground that the federal government, in fact, had the right to control the physical activities of the unit materiel caretaker:

> "The federal government maintains a reasonable measure of direction and control over the method and means of a caretaker's performing his service. There is present every element necessary to constitute a unit caretaker an employee of the United States. The fact that under the regulations the caretaker must be a member of the National Guard and perform duties for the State is immaterial. The injuries were caused while the caretaker was in the performance of his duties for the United States, not the state."

Briefly, the court's holding that the United States possessed a reasonable measure of control over the physical activities of the unit materiel caretaker in question was based upon the fact that the United States,

through its regulations, issued by the National Guard Bureau, prescribed the pay scale for the position, general working conditions, and in detail, the right of caretakers to annual leave, sick leave and military leave, including accumulation of annual sick leave. Naturally, the fact that caretakers are authorized to be paid only on standard forms designated by the National Guard Bureau and by funds drawn on the Treasury of the United States, was not without some weight.

This view is given added weight by the testimony of General Stevens, Adjutant General of the State of Washington, when he testified, in effect, that his authority over unit materiel caretakers stemmed from his capacity as an officer of the Army of the United States by virtue of authority delegated to him through federal orders, rather than from his capacity as an officer of the State of Washington National Guard (R. 143, 144).

In brief summary, it is appellees' contention that it is immaterial whether the State of Washington had any right to control the activities of the unit materiel caretaker in question, inasmuch as any such right was by virtue of a delegation of authority from the Secretary of the Army, or, at the very least, was not incompatible with the right to control which at all times existed in the National Guard Bureau, the Secretary of the Army, and the United States Defense Establishment.

Lt. Col. Hagen, the United States Property and Disbursing Officer, under the facts of this case, is a federal employee within the meaning of the Federal Tort Claims Act.

Appellant tacitly conceded its right to control this officer at the inception of the trial by an order, later rescinded, from the Judge Advocate General's Department of the United States Army, ordering him not to testify (R. 64).

The Colonel conceded that he was on duty as an officer of the United States Army, and not as a colonel of the Washington National Guard (R. 187). General Stevens testified that Col. Hagen was on active federal duty, since he was a full time employee of the National Guard Bureau, an integral part of the department of the Army set up to supervise the State National Guards (R. 142) This was likewise recognized by the court (R. 191, 192).

It should be emphasized that appellant has not in any way questioned the negligence of the issuance by the United States to Battery C of the 770th AAA Battalion of a truck and trailer for use on the highways of the state knowing them to be in a defective and unfit condition for such operation. The United States Property and Disbursing Officer is the last federal link in the chain whereby United States equipment is given to the particular state National Guard Battery that is designated to get that equipment by the Table of Organization & Equipment established by the Department of Army.

The position of United States Property and Disbursing Officer is authorized by federal statute, 32 UCS 49. The statute provides, essentially, for the designation of qualified National Guard personnel to be detailed by the Secretary of the Army for this type of duty, and provides that after designation and confirmation by the Secretary of War, the appointee shall be the property and disbursing officer of the United States. He is required to receipt and account for all funds and property belonging to the United States in possession of the National Guard of his state, is required to make detailed returns and reports to the Secretary of the Army, give good and sufficient bond to the United States prior to entering upon his duties, conditioned on the faithful performance thereof, receive pay at a rate to be fixed by the Secretary of the Army, and be reimbursed for travelling expenses out of federal funds. The status of an appointee under the aforesaid statute has been determined in a criminal case, where any doubt as to his non-federal status would, naturally, have been resolved in favor of the defendant. The court in *Woodford v. United States*, 77 F. 2d 861 (C.A. 8), stated, in part, as follows:

> "The indictment described appellant as 'an officer of the United States, to-wit, the Property and Disbursing Officer of the United States for Arkansas, duly appointed and acting as such' under the provisions of this act of Congress. This argument of counsel is directed mainly to their contention that the appointment is by the governor of the state, and, therefore, not by the

> head of a department of the government as required by constitutional mandate. The meaning conveyed by the language of the act is clear and unambiguous. The governors of the states merely designate or detail the officers of the National Guard for the consideration of the Secretary of War as proposed Property and Disbursing Officers of the United States, to administer allotments out of the annual appropriation made by the government for the support of the National Guard of the several states. When the persons so designated are approved by the Secretary of War, they become such officers of the United States within the meaning of Section 2 of Article II of the Constitution. The indictment alleges that the appellant was duly so appointed and so acted. The Secretary of War is the head of a department of government; expressly authorized by Act of Congress. Approval of an appointment, designation or detail, made by the governor is equivalent to a direct appointment by the Secretary himself."

The possible dual nature of the function of the United States Property & Disbursing Officer has led to some apparently conflicting decisions. It is probably similar to the status of General Stevens, who testified to his dual status by virtue of his capacity as an officer in the Army of the United States and as Adjutant General of the State of Washington (R. 143).

On the facts of the instant case, the law would appear to be well settled that Col. Hagen was an officer and employee of the United States at the time of commission of his negligent act.

II.

The historical development of the National Guard as a state organization is not inconsistent with the master-servant relationship with the United States asserted by appellees.

Point II of appellant's brief (page 26) proceeds on the premise that no officer or enlisted man of the reserve component can be an employee of the United States when not on active duty and that because the Washington National Guard was not in active federal service there could be no relation of master-servant between the United States and any individual connected in any way with the Washington National Guard, citing the historical separation between the two as authority.

This argument fails to recognize: (1) that the United States may hire, through delegated authority, full time civilian caretakers to care for and look after property of the United States on loan to the state National Guards during the periods such National Guards are not in active federal service; and (2) that officers of reserve components may be ordered to active duty and detailed for duty with National Guards not in active federal service; and (3) that certain practical modifications have of necessity been engrafted on the traditional "separation," some of which have given rise to the dual employment relationship described by appellees and recognized by the pertinent case authority.

Federal statutes exclusively regulate the National Guard. The National Guard of the United States is

established as a component part of the defense establishment and as a reserve component of the Army of the United States, 32 USC 4 a. The form of organization of National Guard units is prescribed by a federal statute, 32 USC 5. Reports are required of state officials, 32 USC 13. Federal inspections form the basis for allotment of federal funds, 32 USC 15. The President is authorized to make all necessary rules and regulations for the government of the National Guard. 32 USC 17. Appointments of officers in the National Guard below the grade of Brigadier-General are made exclusively by the President, and general officers by and with the advice and consent of the United States Senate, 32 USC 18. All officers so appointed are commissioned as officers of the United States. 32 USC 18 a. An annual appropriation is made for the support of the National Guard, including the provision of arms, ordinance stores, quartermaster stores, and camp equipage, and all other military supplies, 32 USC 21. The National Guard, so far as is practicable, is equipped and armed with the same type of uniforms, arms and equipment as are provided for the Regular Army, 32 USC 31. The discipline of the National Guard is required to conform to the system which is prescribed for the Regular Army, 32 USC 61, and the training is supervised by regular army officers assigned to the task, 32 USC 66.

It would seem manifest, then, that federal control over the National Guard is exercised in several ways, in supervisions and training under the direction of the

army and corps area commanders, in regular army inspections, in regular army instructors, in regulations in the form of "National Guard Regulations, Special Regulations, and National Guard Bureau Circulars." in administration of the Uniform Code of Military Justice, and in "federal recognition." It can scarcely be doubted that the keystone of the entire system of federal control of the National Guard is its control of the "purse strings." by "federal recognition," the Secretary of the Army of the United States has virtually complete control over every single activity of the National Guard as a whole, and of the individual units, Appellees will be the first to concede that the National Guard retains some vestiges of its original status as a state militia force, and is subject to the control of the governor of the state under certain circumstances. Nevertheless, appellees contend that while it is all very well to speak of the National Guard of today as though is were a motley militia force of pre-revolutionary days, such an approach is academic, at best, and gives no heed whatever to the realities of the situation as outlined hereinbefore.

III.

General holdings concerning National Guard personnel, as such, are inapplicable to the present controversy.

Appellant admits that the case authority involving the employment status of civilian unit materiel caretakers clearly supports the judgment of the District Court in this case. They seek, however, to avoid the results in those cases by citations to cases where only

the general status of a member of a state National Guard, as such, were involved. Appellees do not challenge the cases relied upon by appellants to the extent that their holdings are limited to the activities of state National Guardsmen in their capacities as such. On the day of the accident herein involved, Brown did not perform any duty that would be compensated for as drill time as a member of his National Guard battery (R. 137).

The authorities relied upon by appellant as controlling the employment status of Col. Hagen are answered by the testimony in this case, as hereinbefore recited, and by the reasoning in *Woodford v. United States*, 77 F. 2d 861 (C.A. 2), *supra*.

IV.

Appellees deny that Federal support and "recognition" of National Guard units is a grant in aid program, as contended by appellant.

In its fourth argument, appellant contends that "in the absence of a clear and unequivocal declaration of liability in the Federal Tort Claims Act, Congress should not be presumed to have exposed the federal government to tort liability for its participation in the National Guard or any other grant in aid program." This argument makes two assumptions, both of which appellees deny. The first is that federal recognition of a National Guard unit is simply a grant in aid program which, in the words of appellant, can be equated with federal grants for the purpose of providing hot lunches for school children. Suffice it to say, that the

entire problem now before the court concerns the measures which the United States admittedly has taken for the purpose of protecting, safeguarding, and maintaining federally owned arms and equipment loaned to an armed force which is an integral part of the United States Defense Establishment. Appellees feel that it should be obvious that there is a considerable difference between the defense problem of the United States and implications as hereinabove stated, and the maternal and child health services and poliomyelitis vaccination services which appellant asserts are precise parallels.

Appellant's argument further assumes that appellees have contended that the United States is liable under the Federal Tort Claims Act merely because it "participates" in the National Guard program. Appellant misapprehends entirely the position appellees have taken from the outset of this case. Appellees have, and do, contend that Colonel Albert G. Hagen, the United States Property and Disbursing Officer at Camp Murray, Washington, on the 11th day of March, 1953, was a servant and employee of appellant, acting within the scope of his employment as such at the time he issued a certain truck and trailer in the manner more particularly described in the record (R. 186 *et seq.*). Appellees, further, have and do contend that Brown, the unit materiel caretaker, was a servant and employee of the appellant, United States, at the time he received the aforesaid truck and trailer and drove it upon the highways of the State of Washington.

Appellant does not deny that either Colonel Hagen or Sergeant Brown were negligent in their acts.

Appellant's next contention, implicitly at least, is to the effect that the United States should not be held liable in the instant cause since the Federal Tort Claim Act does not expressly state that unit materiel caretakers and United States Property & Disbursing Officers assigned to National Guard units are federal employees, for whose negligence the United States is responsible. Appellees feel that such a position would impose an intolerable burden upon Congress in enacting legislation of that type, and suggests that the judiciary is well able to determine the liability of the parties in the present case.

CONCLUSIONS

For the reasons hereinabove stated, appellees respectfully request that the judgment of the District Court be affirmed.

Casey & Pruzan
Jack M. Sawyer
30th Floor, Smith Tower
Seattle 4, Washington